

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**

3 CARMEN IOVINO,

4                   Plaintiff

5 v.

6 AM TRUST FINANCIAL SERVICES, INC.,  
7 et. al,

8                   Defendants

Case No.: 2:22-cv-01974-APG-NJK

**Order Denying Iovino's Motion to Dismiss  
Counterclaim**

[ECF No. 120]

9           Carmen Iovino was injured in a car crash while driving a company truck for his  
10 employer, TopNotch Services, Inc. The driver who caused the crash is unknown, so Iovino  
11 sought benefits under TopNotch's insurance policy with defendant Security National Insurance  
12 Company (SNIC) for underinsured/uninsured motorist (UIM) coverage. Iovino alleged that he  
13 sustained injuries well above the policy's \$1 million limit but was paid less than half of the  
14 benefits that he claims are due. Iovino sued SNIC; its parent company, AmTrust Financial  
15 Services, Inc.; and its claim processor, AmTrust North America, for breach of contract, breach of  
16 the covenant of good faith and fair dealing, unfair trade practices, and fraud.

17           SNIC filed a counterclaim seeking a declaration that Iovino voided the policy by  
18 misrepresenting that he suffered lost earnings despite experiencing increased income since the  
19 crash. Iovino moves to dismiss the counterclaim arguing that it fails to state a claim for fraud or  
20 misrepresentation and is barred by affirmative defenses. Iovino also moves for sanctions under  
21 Federal Rule of Civil Procedure 11, asserting that SNIC's counterclaim is frivolous. SNIC  
22 responds that it has plausibly described a misrepresentation that, under the policy's terms, voids  
23 the contract and it does not need to satisfy the reliance element for a common law claim of

1 fraudulent misrepresentation because it is not asserting a common law fraud claim. SNIC  
2 contends that Iovino's affirmative defenses involve factual disputes not apparent from the face of  
3 the counterclaim, so I should not address them when resolving a motion to dismiss. As for  
4 sanctions, SNIC asserts that it has pleaded a plausible claim on the merits and that Iovino has not  
5 complied with Rule 11(c)(2)'s mandatory safe-harbor provisions.

6 The parties are familiar with the facts, so I repeat them here only as necessary to resolve  
7 the motion. The counterclaim plausibly describes a material misrepresentation under the policy  
8 and does not assert a common law fraudulent misrepresentation claim, so I deny Iovino's motion  
9 to dismiss. Additionally, Iovino's arguments about laches, unclean hands, and the veracity of his  
10 representations are not suitable for resolution at the dismissal stage. Because the deadline for  
11 dispositive motions has passed, I will set a briefing schedule for the parties to move for summary  
12 judgment on this claim only, should they choose. I deny Iovino's motion for sanctions.

### 13 **I. ANALYSIS**

14 In considering a motion to dismiss, I take all well-pleaded allegations of material fact as  
15 true and construe the allegations in the light most favorable to the non-moving party. *Kwan v.*  
16 *SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). However, I do not assume the truth of  
17 legal conclusions merely because they are cast in the form of factual allegations. *Navajo Nation*  
18 *v. Dep't of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017). A plaintiff must make sufficient  
19 factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550  
20 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions, [or] a  
21 formulaic recitation of the elements of a cause of action." *Id.* at 555.

1           **A. Fraudulent Misrepresentation**

2           Iovino argues that the counterclaim fails to satisfy the reliance element of a common law  
3 fraudulent misrepresentation claim because none of the \$475,000 SNIC paid under the policy  
4 was for lost earnings, and Iovino never submitted a claim for lost wages or loss of earning  
5 capacity. SNIC responds that it is not asserting a common law fraudulent misrepresentation  
6 claim. Rather, it seeks a declaration that Iovino's misrepresentations triggered the concealment,  
7 misrepresentation, or fraud endorsement in the insurance contract, and SNIC does not need to  
8 rely on the misrepresentation to void the policy.

9           The counterclaim alleges two communications in which Iovino represented that he  
10 suffered a loss of earnings. The first is a February 2020 exchange where Iovino's counsel  
11 represented to SNIC that "if we cannot settle the case now and have to proceed to litigate the  
12 damages, we will seek an expert evaluation for a loss of earning capacity claim," and "given  
13 [Iovino's] substantial income base, this part of his damages would be significant." ECF No. 108  
14 at 28. The second communication was a March 2022 demand letter where Iovino references  
15 expert reports that describe "the loss of household services, reduction in value of life and Mr.  
16 Iovino's loss of earnings." *Id.* at 29. SNIC alleges that these communications were false because  
17 a review of Iovino's earnings in the years after the accident shows that his income increased over  
18 that time.

19           SNIC's counterclaim does not seek damages for the tort of fraudulent misrepresentation.  
20 Rather it seeks "a declaration that the CONCEALMENT, MISREPRESENTATION OR FRAUD  
21 Endorsement applies to prevent or preclude further payment in connection with Iovino's  
22 uninsured motorist claim." *Id.* at 30. SNIC asks the court to interpret this term of its contract and  
23 determine whether Iovino's representations amounted to "concealment or misrepresentation of a

1 material fact” or “fraud” under the contract. *Id.* at 27. On its face, the counterclaim alleges  
2 plausible misrepresentations that were material to SNIC’s valuation of Iovino’s uninsured  
3 motorist claim. Iovino represented that he would hire an expert to calculate loss of earnings and  
4 later that an expert had outlined a loss of earnings. These alleged misrepresentations were  
5 material because they plausibly asserted that Iovino’s claim was worth more than SNIC had  
6 believed. And these statements are plausibly false because SNIC alleges that Iovino’s income  
7 increased in the years after the crash. I therefore deny Iovino’s motion to dismiss the  
8 counterclaim for failing to assert a claim upon which relief can be granted.

9 **B. Iovino’s Other Arguments**

10 Iovino also argues that I should dismiss SNIC’s counterclaim because it is barred by the  
11 doctrines of laches and unclean hands, and because the subject representations were not false.  
12 SNIC responds that it did not delay bringing the counterclaim, and that these arguments involve  
13 factual disputes not apparent on the face of the counterclaim.

14 Laches and unclean hands are both affirmative defenses that Iovino bears the burden of  
15 proving. *See Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1125-26 (9th Cir. 2006); *Metal*  
16 *Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1244-45 (9th Cir. 2021). “Ordinarily, affirmative  
17 defenses may not be raised on a motion to dismiss.” *U.S. Commodity Futures Trading Comm’n*  
18 *v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019) (cleaned up). But I may “consider an  
19 affirmative defense on a motion to dismiss when there is some obvious bar to securing relief on  
20 the face of the complaint.” *Id.* at 973 (quotation omitted).

21 Because it is not clear from the face of SNIC’s counterclaim that laches or unclean hands  
22 bars the action, I deny Iovino’s motion to dismiss based on those doctrines. I similarly decline to  
23

1 decide whether the representations described in the counterclaim are false because doing so  
2 would require me to review material outside the pleadings.

3 Iovino's motion to dismiss raises factual issues. He states on page 14 of the motion,  
4 "since Discovery closes August 27, 2024, this motion should consider evidence outside of the  
5 pleadings and [be] treated as a motion for summary [sic] judgment. FRCP 12(d)." ECF No. 120  
6 at 14. This is the only mention of summary judgment in Iovino's brief. SNIC asks that I allow it  
7 time to respond if I choose to treat the motion as one for summary judgment. The parties have  
8 since conducted additional discovery, including deposing SNIC's Rule 30(b)(6) witness. *See*  
9 ECF No. 155. The deadline for dispositive motions has passed without the parties addressing  
10 this counterclaim. *See* ECF No. 91 at 2. I will therefore allow either party to file a new  
11 dispositive motion on SNIC's counterclaim only, should they choose to do so.

### 12 **C. Sanctions**

13 Iovino asks me to sanction SNIC under Rule 11 for filing a frivolous counterclaim. SNIC  
14 responds that it has pleaded a plausible claim on the merits and that Iovino has not complied with  
15 Rule 11(c)(2)'s mandatory safe-harbor provisions. In reply, Iovino argues that he has repeatedly  
16 asked SNIC to clarify its position regarding any misrepresentations, and SNIC refused to  
17 respond, raising the issue for the first time in the counterclaim.

18 "A motion for sanctions must be made separately from any other motion and must  
19 describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c)(2). The  
20 movant must serve the motion, but cannot file the motion with the court if the challenged action  
21 is withdrawn or appropriately corrected within 21 days after service. *Id.* Rule 11's 21-day safe  
22 harbor period is mandatory. *Truesdale v. S. Cal. Permanente Med. Grp.*, 293 F.3d 1146, 1151  
23

1 (9th Cir. 2002). “This period is meant to give litigants an opportunity to remedy any alleged  
2 misconduct before sanctions are imposed.” *Id.*


3 Iovino fails to show that he gave SNIC the required opportunity to respond. And because  
4 I decline to dismiss SNIC’s counterclaim under Rule 12(b)(6), I do not find it frivolous. Thus, I  
5 deny Iovino’s request for sanctions.<sup>1</sup>

6 **II. CONCLUSION**

7 I THEREFORE ORDER that Carmen Iovino’s motion to dismiss Security National  
8 Insurance Company’s counterclaim (**ECF No. 120**) is **DENIED**.

9 I FURTHER ORDER that either party may file a dispositive motion on this counterclaim  
10 only by February 13, 2025. If any party moves for summary judgment on this counterclaim, the  
11 parties will follow the normal briefing schedule for summary judgment motions.

12 DATED this 30th day of January, 2025.

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15 ANDREW P. GORDON  
16 CHIEF UNITED STATES DISTRICT JUDGE  
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23 <sup>1</sup> Iovino also failed to comply with Rule 11(c)(2)’s requirement that a motion for sanctions must  
be made separately from any other motion. He is advised that any future motions for sanctions  
must comply with this rule.